CHEN HENG PING @ TIAN SEOW HOCK & 5 ORS.

v.

INTRADAGANG MERCHANT BANKERS (M) BERHAD

COURT OF APPEAL, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM JCA
DATO' N. H. CHAN JCA
DATO' MAHADEV SHANKAR JCA
20 FEBRUARY 1995

BANKING & FINANCE: *Certificates of indebtedness - Mode of proof - Failure to show fraud or manifest error on the face of certificates - Effect - Whether certificates bound to be taken as conclusive proof of debt - Bankers' Books (Evidence) Act 1949 ss. 3, 4 & 5.*

The appellants stood guarantors for two loans which the respondent bank had granted to Campall Sdn. Bhd. (Campall). By the relevant contracts of guarantee the appellants assumed joint and several liability over the loan and undertook to pay all sums advanced to Campall.

The facts showed that as of March 1993 the cumulative debt of Campall stood at more than RM3.5 million. This being the case letters of demand demanding payment of the debt were sent out by the bank to the appellants but all these went unheeded. The bank then filed recovery proceedings and following that, applied, successfully, for summary judgment under O. 14 Rules of the High Court 1980. The appellants appealed against this summary order and argued before the appeal Judges *inter alia*:

1. that the bank could not proceed against them as the liability of Campall was yet to be established.

2. that the certificates of indebtedness tendered under clause 3.19 of the guarantees herein by the bank were not conclusive of the debt as the same did not comply with the provisions of the Bankers' Books (Evidence) Act 1949.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] When an application is made for summary judgment under O. 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. The appellants in the present case do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.

[2] There is no merit in the contention that the bank could not proceed against the appellants before establishing first the liability of Campall. Clause 3.21 of the guarantees herein specifically provided that the bank was entitled to pursue the guarantors without first availing itself of its legal remedies against Campall.

[3] The certificates of indebtedness, on the facts, ought to be taken as conclusive. The appellants themselves had conceded that the certificates were not tainted with manifest errors and therefore there is no duty on the bank to prove the quantum of the debt.

[4] The statutory mode of proof provided by the Bankers' Books (Evidence) Act 1949 applies when bankers desire to put in evidence their original books or entries therefrom but do not

wish to release custody of the originals. The Act in other words permits proof by way of certified copies. It has nothing to do with the production of a certificate of indebtedness which is an original document and which the debtor has contractually bound himself to have admitted in evidence against him.

[Appeal dismissed].

[**Bahasa Malaysia** Translation of Headnotes]

PERBANKAN & KEWANGAN: *Sijil keterhutangan - Cara pembuktian - Kegagalan menunjukkan frod atau kesilapan nyata di permukaan sijil - Kesan - Samada sijil akan dianggap sebagai telah membuktikan hutang - Akta (Keterangan) Buku-Buku Jurubank 1949 ss. 3, 4 & 5.*

Perayu adalah penjamin kepada dua pinjaman yang telah diberikan oleh bank responden kepada Campall Sdn. Bhd. (Campall). Dibawah kontrak jaminan yang relevan perayu menjamin untuk menanggung, samada secara berasingan atau bersesama, semua liabiliti pinjaman tersebut serta memberi kesanggupan untuk membayar balik segala wang yang dipinjamkan kepada Campall.

Fakta menunjukkan bahawa setakat bulan March 1993 hutang terkumpul yang ditanggung oleh Campall tertunggak sehingga melebihi RM 3.5 juta. Berikutannya pihak bank telah menghantar beberapa surat tuntutan kepada perayu menuntut pembayaran balik hutang tersebut tetapi kesemua surat-surat ini tidak diendahkan oleh perayu. Pihak bank dengan itu memulakan prosiding untuk mendapat kembali hutang dan selepas itu memohon, dan memperolehi, satu perintah penghakiman terus di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Perayu merayu terhadap perintah penghakiman terus ini dan berhujah di hadapan Hakim-Hakim rayuan antara lain:

1. bahawa pihak bank tidak boleh meneruskan tindakan terhadap mereka oleh kerana liabiliti Campall masih belum lagi dibuktikan.
2. bahawa sijil keterhutangan yang dikemukakan oleh pihak bank di bawah fasal 3.19 surat jaminan di sini tidak mematuhi peruntukan Akta (Keterangan) Buku-Buku Jurubank 1949 dan oleh itu ianya adalah tidak konklusif.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Apabila sesuatu permohonan yang dibuat untuk mendapatkan penghakiman terus di bawah A. 14 itu disokong oleh afidavit yang menunjukkan bahawa memang tidak wujud apa-apa pembelaan, maka defendan mestilah memberikan sebab mengapa izin untuk membuat pembelaan harus diberikan. Ini bermakna bahawa defendan hendaklah memberikan jawapan bersumpah yang berupa keterangan yang menunjukkan bahawa dia mempunyai suatu pembelaan yang layak untuk dibicarakan. Keperluan ini nampaknya telah tidak diendahkan oleh perayu dalam kes semasa ini. Afidavit-afidavit mereka hanya berdasarkan kepada pembelaan yang mereka plid, yang mengandungi cuma penyangkalan kosong dan beberapa hujah undang-undang yang tidak boleh dipertahankan.

[2] Tidak ada merit dalam hujah bahawa pihak bank tidak boleh bertindak terhadap perayu sebelum terlebih dahulu membuktikan liabiliti Campall. Fasal 3.21 dalam surat-surat jaminan di sini secara khusus menyatakan bahawa pihak bank boleh bertindak terhadap penjamin walaupun tanpa terlebih dahulu bertindak mendapatkan apa-apa remedi undang-undang daripada Campall.

[3] Sijil keterhutangan berkenaan, di atas fakta kes, haruslah dikira sebagai konklusif. Perayu sendiri telah mengakui bahawa sijil tersebut tidak mengandungi apa-apa kesilapan nyata dan oleh sebab kuantum hutang tersebut tidak perlu dibuktikan oleh pihak bank.

[4] Cara pembuktian statutori seperti yang diperkatakan oleh Akta (Keterangan) Buku-Buku Jurubank 1949 hanya terpakai bilamana jurubank berhasrat untuk memasukkan ke dalam keterangan buku-buku asal mereka ataupun apa-apa catitan darinya tetapi enggan melepaskan penjagaan dokumen-dokumen asal tersebut. Dalam lain perkataan, Akta ini mengizinkan pembuktian dibuat melalui salinan-salinan sah. Maka itu ianya adalah tidak berhubungan langsung dengan pengemukaan sijil keterhutangan yang mana ianya adalah suatu dokumen asal dan di mana penghutang sendiri telah membuat pengakuan yang mengikat dirinya dalam keterangan yang diberikan terhadapnya.

[Rayuan ditolak].

Cases referred to:

D & C Nomura Merchant Banker's Bhd. v. Gunung Kuari Sdn. Bhd. & 3 Others [1990] 2 CLJ 58 ***(foll)***

D & C Bank Bhd. v. Datuk K.K. Sharma [1988] 2 CLJ 453 ***(foll)***

The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. & Anor [1988] 2 CLJ 859 ***(foll)***

D & C Bank Bhd. v. Abdullah bin Ismail [1989] 1 CLJ 190 ***(foll)***

Bank Bumiputera (M) Bhd. v. Perbadanan Kemajuan Negeri Perak [1989] 1 MLJ 502 [1989] 1 CLJ 1051 ***(foll)***

D & C Bank Bhd. v. Che Wan Development Sdn. Bhd. & 3 Ors [1989] 2 CLJ 1200, [1990] 1 MLJ 12 ***(foll)***

MBF Finances Bhd. v. Hasmat Properties Sdn. Bhd. & 3 Ors. [1990] 1 CLJ 107 ***(foll)***

Oriental Bank Bhd. v. Jaafar Sidek & Mohd. Salam & 2 Ors. [1990] 2 CLJ 72 ***(foll)***

Citibank N.A. v. Ooi Boon Leong & Others [1981] 1 MLJ 282 ***(foll)***

Dobbs v. The National Bank of Australasia Ltd. [1935] 53 CLR 643 ***(foll)***

Bache & Co. (London) Ltd. v. Banque Vernes Et Commerciale de Paris S.A. [1973] 2 Lloyds. Rep. 437 ***(foll)***

Bangkok Bank Ltd. v. Prosperity Shipping & Trading (Pte) Ltd. & Ors. [1990] 1 MLJ xxix ***(foll)***

Bangkok Bank v. Cheng Lip Kwong [1990] 1 CLJ 1017, [1990] 2 MLJ 5 ***(foll)***

Chung Khiaw Bank Ltd. v. Bhojwani & Anor. [1990] 2 MLJ 146 ***(foll)***

Bank of Commerce (M) Bhd. v. Tan Boon Soon [1995] 1 AMR 156 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

Bankers' Books (Evidence) Act 1949, ss. 3, 4 & 5

Other source referred to:

Halsbury's Laws of England, 15, 3rd Edn., para 278

For the plaintiff - V. Pradhan; M/s. Skrine & Co.

For the defendant - Dr. S. Balasekaran (L.H. Ng with him); M/s. Bala & Co.

JUDGMENT

Mahadev Shankar JCA:

We dismissed this appeal against the summary judgment obtained by the respondent bank (the bank) against the appellants. Our reasons now follow.

On 6 September 1989 the bank agreed to provide a loan (the loan) of RM1.5 million to Campall Industries Sdn. Bhd. (Campall). On 15 October 1990 the bank agreed to provide a further loan by way of an overdraft facility (the facility) to the amount of RM1.6 million. In

consideration of agreeing to provide the loan and the facility, the appellants executed one contract of guarantee in respect of the loan and another contract of guarantee in respect of the facility.

Both contracts were in identical terms except as to the dates and the amount aforesaid. The liability of the appellants (the guarantors) were joint and several. The guarantors undertook to pay on demand all sums advanced to Campall together with the interest thereon.

As at 1 March 1993 the bank had advanced to Campall under the loan and the facility the total sum of RM3,027,357.35. The interest on this principal sum as on that date was RM554,972.34. The cumulative amount was thus RM3,582,329.59 ("the debt").

On 18 May 1993 the bank's solicitors sent each of the guarantors a letter by registered post demanding payment of the debt within 14 days. None of the guarantors replied to this letter, let alone suggesting that they had any defence to the claim. On 7 September 1993 the process server of the bank's solicitors personally left at the last known address of the 3rd, 5th and 6th defendants at Batu Pahat another letter of demand dated 27 August 1993 for the said debt. These modes of service were expressly authorised by the said guarantors. The second demand also went unheeded.

These proceedings were filed on 4 April 1994. All the guarantors entered appearance. An amended defence was filed on 16 December 1993. It was followed shortly afterwards by the bank's application praying for summary judgment under O. 14 or alternatively for the defence to be struck out under O. 18 r. 19 of the Rules of the High Court 1980.

The bank's application was supported by the affidavit affirmed by its senior vice-president, who deposed to the facts hereinbefore set out. Both the guarantees were exhibited. Clause 3.19 read as follows:

> 3.19 that a certificate by an officer of the bank as to the money and liabilities for the time being due or incurred from or by the borrower to the bank shall, in the absence of manifest error, be conclusive evidence in any legal proceedings against the guarantor or any of them;

Also exhibited were the demand letter to Campall dated 30 November 1992, which set out full details of the moneys advanced, two certified statements of account dated 6 December 1993 showing the moneys and liabilities due to the bank on the loan, and on the facility, two demand letters and the process server's affidavit.

When an application is made for summary judgment under O. 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.

At the hearing in the Court below the first line of argument they raised was that before the bank could proceed against the guarantors it had first to establish the liability of Campall. This did not merit contention because clause 3.21 of each guarantee specifically provided that the bank was entitled to pursue the guarantors without first availing itself of its legal remedies against Campall.

The second line of argument was that the certificates of indebtedness tendered under clause 3.19 of the guarantees were not conclusive because they did not comply with the Bankers' Books Evidence Act and because the officer had not certified that the documents were identical to the books in the bank.

In the Court below, Y.A. Dato' V.C. George rejected this argument out of hand. Before us it was raised again.

In *D & C Nomura Merchant Banker's Bhd. v. Gunung Kuari Sdn. Bhd. & 3 Others* [1990] 2 CLJ 58 at p. 60 Y.A. Dato' V.C. George said this:

> Section 4.01 provides that the guarantee will be in addition to other security and by s. 7.04 it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the 1st defendant.
>
> In the instant case there is such a certificate of indebtedness under the hand of an authorised officer the plaintiff bank.
>
> The judgment of Shankar J in *MIMB v. G & C Securities K.L. HCCS* 23-1657-86 unreported and the judgment in *Bank Bumi v. Doric Development Sdn. Bhd.* [1988] 1 MLJ 462, 463 provided authority for the proposition that such a certificate is indeed binding unless there is manifest error.

Similar statements can be found in the following cases:

(i) *D & C Bank Bhd. v. Datuk K.K. Sharma* [1988] 2 CLJ 453 at 456.

(ii) *The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. & Anor.* [1988] 2 CLJ 859 and 860.

(iii) *D & C Bank Bhd. v. Abdullah bin Ismail* [1989] 1 CLJ 190 at 191.

(iv) *Bank Bumiputera (M) Bhd. v. Perbadanan Kemajuan Negeri Perak* [1989] 1 MLJ 502 and also (1989) 1 CLJ 1051 at 1053.

(v) *D & C Bank Bhd. v. Che Wan Development Sdn. Bhd. and 3 Ors.* and *Loh Ah Kiew* [1989] 2 CLJ 1200 at 1202 also at [1990] 1 MLJ 12.

(vi) *MBF Finances Bhd. v. Hasmat Properties Sdn. Bhd. & 3 Ors.* [1990] 1 CLJ 107 at 110.

(vii) *Oriental Bank Bhd. v. Jaafar Sidek & Mohd. Salam & 2 Ors.* [1990] 2 CLJ 72.

These cases go back to a Supreme Court decision *Citibank N.A. v. Ooi Boon Leong & Others* [1981] 1 MLJ 282 where Raja Azlan Shah CJ Malaya (as he then was) approved *Dobbs v. The National Bank of Australasia Ltd.* [1935] 53 CLR 643 and *Bache & Co. (London) Ltd. v. Banque Vernes Et Commerciale de Paris S.A.* [1973] 2 Lloyds. Rep. 437.

There are also a line of Singapore cases starting with *Bangkok Bank Ltd. v. Prosperity Shipping & Trading (Pte) Ltd. & Ors.* [1990] 1 MLJ xxix (where Shaun Chan A.R. went so far as to hold that to allow an application for further and better particulars of the quantum of the debt would emasculate the 'conclusive evidence' clause), *Bangkok Bank v. Cheng Lip Kwong* [1990] 1 CLJ 1017, also at [1990] 2 MLJ 5 and *Chung Khiaw Bank Ltd. v. Bhojwani & Anor.* [1990] 2 MLJ 146.

Before us Counsel for the guarantors confined himself to the fourth headnote of *Oriental Bank Bhd. v. Jaafar Sidek b. Mohd. Salam & 2 Others* [1990] 2 CLJ 72, and read us the passage in Y.A. Siti Norma Yaakob's judgment at 74. A proper understanding of the passage requires a consideration of the previous paragraphs but for the present purpose it will suffice if we reproduce the passage read and the paragraph immediately preceding it:

> There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.
>
> In the light of such apparent likelihood of the 1st defendant's account being incorrect, the application cannot be intended to have the effect of circumventing clause 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the 1st defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under clause 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

We were also referred to *Bank of Commerce (M) Bhd. v. Tan Boon Soon* [1995] 1 AMR 156 at p. 168 where Y.A. Selventhiranathan referred to the cases just cited and then said:

> Similarly, in this case, although the second defendant had disputed the sum claimed by alleging that no credit had been given for the realization of the securities given and there was evidence to this effect in the widely divergent sums claimed from the first defendant as compared with that from the second defendant, yet the plaintiff steadfastly refused to show how the different sums were arrived at, claiming that it was so privileged under the guarantee. With respect, this cannot be the position in law. Otherwise the Court would be lending itself to even the making of false or exaggerated claims by plaintiffs by allowing non-accountability clauses in guarantees to be abused to the extent of the plaintiffs seeking total refuge behind their wording.

In his judgment Shaun Chan A.R. referred to 15 *Halsbury's Laws of England* (3rd Edn.) para 278. In the present context that passage should be understood to mean that even though the guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, it does not prevent the guarantors from adducing evidence to show that there is a manifest error on the face of the certificate or fraud. The initial onus is on the guarantors. The Court is not bound by the contractual provision in the guarantee. When evidence is produced which casts doubts on the accuracy of the certificate it should not accept the certificate as conclusive. It is then for the plaintiff to prove the quantum of the debt claimed in accordance with the requirements of the Evidence Act.

In the two judgments just cited where Y.A. Siti Norma Yaakob and Y.A. T. Selventhiranathan declined to accept the certificate there was evidence of manifest error. In the case heard by Shaun Chan A.R. (and his decision is deserving of the utmost respect) there was no such evidence. Indeed in this appeal before us Mr. L.H. Ng of Counsel (who appeared with Dr. Bala) conceded there was no manifest error on the face of the certificates. In such a situation a fishing expedition for errors in the guise of an application for further and better particulars would be unwarranted.

Counsel for the guarantors took exception to Y.A. Dato' V.C. George's observation that the guarantors had to go back to the borrower if they wished to obtain verification of the account. Counsel seems to have overlooked the obligation of secrecy the bank owes its customer, not to mention the time, expense and inconvenience involved in supplying copies of the entire history of a borrower's bank account.

The only other point we need to deal with is the contention that the certificate under clause 3.19 of the guarantee was invalid because it had not followed the statutory mode of proof provided by the Bankers' Books (Evidence) Act 1949 especially ss. 3, 4 and 5. With respect this submission was wholly misconceived. This act applies where bankers desire to put in evidence their original books or entries therefrom but do not wish to release custody of the originals. The Act permits proof by way of certified copies provided by the Act. It has nothing

to do with the production of a certificate of indebtedness which is an original document and which the debtor has contractually bound himself to have admitted in evidence against him.

Having dismissed this appeal we ordered costs to be paid both here and in the Court below by the appellants and the deposit be paid out to the respondents in satisfaction *pro tanto* of its taxed costs.